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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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INTERSTATE COMMERCE COMMISSION, APPELLANT

*v.*

BOSTON AND MAINE RAILROAD, ET AL., APPELLEES

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS*

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## JURISDICTIONAL STATEMENT

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MAY 1962

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts is not yet reported but is set forth in Appendix A to the Jurisdictional Statement of the Maryland Port Authority, et al., herein. The judgment of the District Court, dated February 23, 1962, is set forth in Appendix B to that Jurisdictional Statement. The report of the Interstate Commerce Commission dated December 5, 1960, *Equalization of Rates at North Atlantic Ports*, is reported at 311 I.C.C. 689, and the report of the Commission on reconsideration is reported at 314 I.C.C. 185, and these two reports and the Commis-

sion's order of December 5, 1960, are set forth on pages 1-83, 84-105, and 106-107, respectively, of the Appendix (a separate volume) to the three Jurisdictional Statements herein.[1]

## JURISDICTION

The judgment of the District Court was entered on February 23, 1962. Notice of appeal was filed in that court by the Interstate Commerce Commission on March 30, 1962. The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *United States* v. *Drum*, 368 U.S. 370.

## STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix C to the Jurisdictional Statement of the Maryland Port Authority, et al. herein.[2]

## QUESTIONS PRESENTED

The District Court set aside an order of the Interstate Commerce Commission which directed the cancellation of reduced rates proposed by railroads serving the ports of New York, Boston, Albany and Portland (the northern tier ports) on export and import traffic moving between those ports and a defined interior territory. The purpose of the rate reductions

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[1] The Appendix (a separate volume) to the three Jurisdictional Statements herein is hereinafter referred to as App.

[2] The Appendix to the Jurisdictional Statement of the Maryland Port Authority, et al is hereinafter referred to as J.S. App.

was to eliminate long established rate differentials favoring Philadelphia, Baltimore and Hampton Roads (the southern tier ports) on such traffic. The questions presented are:

1. Whether the District Court erred in rejecting the Commission's conclusion that the proposed differential-eliminating rates would be unduly prejudicial to the southern tier ports in violation of Section 3(1) of the Interstate Commerce Act, in view of the Commission's findings that (a) the railroads serving the southern tier ports enjoy advantages of distance and cost, (b) that under parity rates, such railroads could not compete for such traffic with the railroads serving the northern tier ports, and there would be an undue diversion of such traffic from the southern tier ports to New York?

2. Whether the District Court erred in setting aside the Commission's order on the grounds that the Commission (a) failed to give sufficient weight to the interests of shippers, receivers, carriers, and inland communities (b) gave undue weight to the distance disadvantages of the northern tier ports and to the effect of the proposed rates upon the competitive position of the various ports, and (c) failed to find that the distance disadvantages of the railroads serving the northern tier ports reflect cost disadvantages?

3. Whether the District Court erred in finding that the railroads serving the northern tier ports had met their burden under Section 15(7) of establishing that their proposed rates would be just and reasonable, thereby assuming a primary function of the Commission?

4. Whether in investigating proposed rates under Section 15(7), the Commission must permit railroads to compete for import and export traffic without regard to Section 3(1) and other standards for determining the lawfulness of rates?

5. Whether the District Court erred in rejecting or ignoring the Commission's conclusion that approval of the proposed rates notwithstanding the distance and cost disadvantages of the railroads serving the northern tier ports, would require approval of corresponding rate reductions proposed by the railroads serving the southern tier ports to maintain the differentials at a lower rate level, thereby producing destructive competition and needless dissipation of carrier revenues?

## STATEMENT

This case arises out of the competition between New York, Boston, Albany and Portland, Maine (the northern tier ports) and the railroads which serve them, on the one hand, and Baltimore, Philadelphia and Hampton Roads (the southern tier ports) and the railroads which serve them, for import and export traffic to and from "differential" territory. Generally, differential territory comprises western Pennsylvania, Ohio, Indiana, Illinois, and southeastern Wisconsin.[2] For many years, the railroads serving these

[2] It is defined more specifically in the Commission's first report in this proceeding as follows (311 I.C.C. at 691):

> The territory to and from which equalization of the northern tier ports with Baltimore is initially proposed is roughly that represented by Central Freight Associa

north Atlantic ports have maintained port differential rates under which the rail rates from differential territory to Baltimore and Hampton Roads on most import and export shipments are 3 cents per 100 pounds below the rates to and from New York; the rates to Philadelphia are 2 cents below New York; and Boston rates are on a parity with New York. The Baltimore rates also apply to imports through Portland, Maine, which move to differential territory over the lines of Canadian railroads; in other respects, the Portland rates are on the same level as New York. The Philadelphia rates have been made applicable to Albany, N. Y. *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151 (1936).

By tariffs filed to become effective on various dates in 1956, railroads serving the northern tier ports (e.g. New York Central) proposed to reduce their rates on export and import traffic [4] (except iron ore,[5]

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tion territory, including Illinois Freight Association territory and southern Wisconsin, hereinafter called the affected or differential territory. It includes territory on and west of a line extending from a point just west of Buffalo through Warren, Oil City, Butler, Pittsburgh, and Washington, Pa., Wheeling, W. Va., thence along the east bank of the Ohio River to Kenova, W. Va., including points in West Virginia, Charleston and west thereof, certain points in Kentucky on the lines of The Chesapeake and Ohio Railway Company, and points on the south bank of the Ohio River from Huntington, W. Va., to Cincinnati, Ohio.

[4] American railroads have long maintained rates on imports and exports which are lower than the rates on domestic shipments moving to and from the seaports.

[5] The differential rates on imported iron ore were and are the subject of separate Commission and court proceed-

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coal and coke) to the level of the Baltimore rates, with the admitted purpose of eliminating the long established port differentials. Thereupon, railroads serving the southern tier ports (e.g. Baltimore and Ohio) filed tariffs proposing (if the northern lines' reduced rates were found lawful) to so reduce their import and export rates as to maintain the differentials, but upon a lower level of rates. Tl. Commission suspended all of the proposed rates pending investigation, pursuant to section 15(7) of the Interstate Commerce Act.

Following extensive administrative proceedings, the Commission issued its report and order in *Equalization of Rates at North Atlantic Ports*, 311 I.C.C. 689 (reproduced in pp. 1-83 and 106-107 of the Appendix to the three J.S. herein), finding that the proposed reduced rates to the northern tier ports "are not shown to be reasonably related to the present rates

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ings which are reported chronologically as: The initial decision of the Commission in *Iron Ore From Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527, February 5, 1954; second decision of the Commission in *Iron Ore From Eastern Ports to Central Freight Association Points*, 299 I.C.C. 195 dated October 1, 1956. This decision was challenged in a court proceeding entitled *Baltimore & Ohio Railroad Co. v. United States*, 151 F. Supp. 258 (1957), USDC D. of Md. From this decision an appeal was taken to the Supreme Court, 355 U.S. 175, 178. The matter was remanded to the Commission which reopened the proceeding May 12, 1958. The final report of the Commission, designated as Report of the Commission on Second Further Hearing and Reconsideration, was entered on June 15, 1961, and published in 311 I.C.C. 149. Suits challenging this last decision are pending in the United States District Courts for the Southern District of New York and the District of Maryland.

on like traffic between the same interior points and the southern tier ports, and that the proposed rates would result in undue preference of and advantage to the northern tier ports as a group and in undue prejudice and disadvantage to the southern tier ports (in violation of Section 3(1) of the Interstate Commerce Act) (App., p. 71). Thereafter, the Commission reopened the proceeding for the purpose of reconsideration on the existing record "of the lawfulness of the proposed rates separately and independently on traffic to and from each of the northern tier ports" (App., p. 85). On June 15, 1961, the Commission issued its report on reconsideration (set forth on pp. 84-105 of the Appendix to the three Jurisdictional Statements herein) finding "that the proposed rates to and from Albany, New York, Boston, and Portland, separately and collectively, are not shown to be reasonably related to the present rates on like traffic to and from the southern tier ports, and would cause undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports. In other respects, the prior findings are affirmed." (App., p. 102)

In arriving at these conclusions, the Commission made many findings, the principal ones of which may be stated as follows: the present differentials are smaller than they would be if allowed to be set by competitive factors; even under the present rate differentials, New York, by reason of its more frequent ship sailings and similar advantages, handles more general cargo (other than bulk commodities) exports and imports than the southern tier ports combined

(App., pp. 70, 98); under the proposed reduced rates to New York, the revenue would equal or exceed by a very small margin the estimated out-of-pocket costs (App., p. 61); Boston would not be aided by rate parity with the southern tier ports, except perhaps as to grain exports, in that even with its present rate parity with New York it cannot compete with the latter port for general cargo traffic (App., p. 49); undue diversion of most types of traffic from the southern tier ports to New York would result from the proposed rate equalization; (App., p. 70); and, finally,

> * * * The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly established. Thus, approval of respondents' proposed rates would require alternate approval of protestants' proposed rates. This might result in the rates gravitating to their lowest possible level and in a needless dissipation of carrier revenues. We have been given the power to fix rates, among other reasons, for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers. Failure to observe our obligations in the exercise of that power would find us remiss in our duties. The present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained (App., p. 70).

The Commission's action was challenged in the court below in a suit brought by the railroads serving Boston and New York and by groups representing

the interests of those ports. Southern tier port groups and railroads serving those ports intervened as defendants.* On February 16, 1962, the court below rendered its opinion declaring that "the Commission's decision is erroneous in law and lacks the rational basis necessary to uphold it" (J.S. App. A). On February 23, the court below entered its judgment setting aside the Commission's order:

> * * * insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from the Ports of Portland, Maine, Boston, Massachusetts, Albany and New York, New York, denies fourth-section application No. 32204, and prevents differential-eliminating rates from becoming effective, * * * (J.S. App. B)

On March 1, the court below granted motions for a stay of judgment, conditioned upon the prompt perfection of appeals to this Court.

## THE QUESTIONS ARE SUBSTANTIAL

The issues in this case are of the greatest importance both to the North Atlantic ports from Portland, Maine, to Hampton Roads and to the railroads which

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*The original complaints in the court below were directed to the Commission's report of December 5, 1960. At this point, the Department of Justice filed an answer confessing error on the ground that the Commission had failed to consider separately the rates to the individual northern tier ports. Upon the subsequent issuance of the Commission's report on reconsideration and the filing of amended complaints, the Department filed a neutral answer and has not otherwise participated in the case.

serve those ports. As summarized in the Commission's report, the competitive rate relationships between these ports and railroads have been the subject of major controversy at least since 1877 (App., pp. 8-11).[1] Under the present and long-established port differential rates, the port of New York and the railroads serving it handle the great bulk of general cargo imports and exports, while Philadelphia, Baltimore and Hampton Roads and the railroads serving them handle most of the bulk cargoes consisting primarily of export grain and import ores. As the Commission found, elimination of the present differentials in favor of rate parity would result in a substantial diversion to New York of import and export traffic which has long been handled by the southern tier ports.

Alternately, the decision below throws open the door to destructive competition between the railroads serving the respective North Atlantic ports and to a needless dissipation of the revenues of those carriers. This is because the same freedom of action which the decision below would accord to the railroads serving the northern tier ports, obviously must be accorded to the railroads which serve the southern tier ports.

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[1] Problems of port differential rates were before this court in *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627 (1933), holding that a "port" was not a "locality" protected by Section 3(1). In 1935, Section 3(1) was amended to add "ports, port districts, gateways and transit points" to the entities protected by its prohibitions.

Many of the early Interstate Commerce Commission decisions and other materials relating to these port differentials are collected in Daish, *The Atlantic Port Differentials* (1918).

As the Commission found, "The greater distance of the northern tier ports from the [differential] territory, and the higher costs of service to and from those ports, are firmly established" (App., p. 70). In brief, if the decision below stands, the railroads serving the southern tier ports will be free to reduce their rates so as to restore the differentials at a lower rate level, and they have made clear their purpose to do so. Since the greater costs of the railroads serving the northern tier ports will restrict their ability to further reduce their rates, the net result would be continuance of the differentials but with depleted carrier revenues.

Thus, solely in terms of the economic impact of the decision below upon the competing port interests and railroads, we submit that review by this Court is warranted.

Moreover, we contend that the decision below is erroneous in major respects. Thus, the three-judge court held that the Commission's conclusion that the proposed reduced rates by the railroads serving the northern tier ports would violate Section 3(1) was erroneous in that (1) the Commission failed to give due weight to the interests of shippers, receivers, carriers, and inland communities, (2) that the Commission's conclusion "relies on a single subsidiary finding—the distance disadvantage of the northern tier ports", and (3) that "Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of [the competing] railroads * * * but the Commission made no such cost or value findings" (J.S. App., pp. 35-36)

As to (1), the Commission's detailed reports show that it gave detailed consideration to every relevant shipper and carrier interest. In particular, the Commission took into account (as the court below did not) the effect upon the revenues of the competing carriers of a rate war which would result in maintenance of the port differentials at a lower rate level. With respect to (2) and (3), the Commission did indeed take into account the distance disadvantages of the northern tier ports in relation to Baltimore—223 miles in the case of Boston and 117 miles in the case of New York. However, contrary to the statement of the court below, the Commission related distances and costs by its express finding that "The greater distance of the northern tier ports from the affected territory, *and the higher costs of service to and from those ports, are firmly established.*" Moreover, as indicated above, the Commission did not base its conclusion solely upon distance and cost differences, but also took into account the effect of preserving or eliminating the present differentials upon the competing ports and railroads, as well as the financial effect upon the railroads of a restoration of the differentials at a lower rate level.

In addition, the court below stated that in the establishment of the port differentials "No consideration whatever was given to disparity in rail distances then or later" (J.S. App. A, p. 34), and that until this case "the Commission, itself, has continually adhered to the proposition that distance plays no part in the determination of port differentials" (J.S. App. A, p. 34-35). To the contrary, the Commission has never

held that differences in distances play no part in determining the lawfulness of rates to the ports; rather, as the court below itself noted (J.S. App., p. 35), the Commission stated that "It is apparent that considerable disregard of rail distances is characteristic of all port adjustments, as it was in the establishment of the rates here dealt with." That distances have been taken into account in port rate adjustments is illustrated by *Hillsborough County Port Authority* v. *Ahnapee & W. Ry. Co.*, 313 I.C.C. 691, 695, 704-705 (May 1961). In any event, if the court below was holding or suggesting that differences in distance are wholly irrelevant as a matter of law, that concept wholly ignores the principles laid down by this Court in *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593 (1949) that:

> * * * We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. * * *

The reduced rates proposed by the railroads serving the northern tier ports were placed under suspension and investigation by the Commission pursuant to Section 15(7) of the Interstate Commerce Act. Under these circumstances, the burden of proof to show

the lawfulness of the proposed rates was on the proponent carriers. The Commission found that under the proposed rates to and from New York "the revenue * * * would equal or exceed by a very small margin the estimated out-of-pocket costs" (App., p. 61). The Commission specifically refrained from determining whether the proposed rates would be reasonably compensatory pointing out that (App., p. 61):

> * * * a presentation of costs adequate to determine whether the proposed rates would be reasonably compensatory should embrace all types of traffic which those rates are expected to attract, and should reflect the costs of the specific methods by which they would be handled. It may be that other traffic would be forced to absorb a larger portion of the constant costs in order to maintain a national transportation system conforming to the ultimate objectives of the national transpotration policy.

Nevertheless, the court below, concluding that "On this evidence [as to out-of-pocket costs plus *revenue* comparisons which reveal nothing as to costs] the plaintiffs certainly established *prima facie* that the proposed rate schedule is just and reasonable" (J.S. App. A, pp. 32-33), set aside the Commission's order "insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from the Ports of Portland, Maine, Boston, Massachusetts, Albany and New York, New York * * *" (J.S. App. B, p. 38). In so doing, the court below assumed the Commission's primary responsibility for determining

whether proposed rates are reasonably compensatory. As a minimum, this issue should have been remanded to the Commission, and the lower court's failure to do so was clearly erroneous. *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481 (1934).

The court below further stated that "the primary issue is whether equalization is necessary to enable the [railroads serving the northern tier ports] to compete" (J.S. App. A, p. 36) We believe that a fair reading of this statement, in context, is a holding that the Commission erred as a matter of law in according weight to the effect upon the ports of elimination of the rate differentials. We submit that such a concept that the competitive relationships between the ports are wholly subordinate to the competitive needs of particular railroads is entirely inconsistent with this Court's recently expressed recognition of the relevance of the interrelationship between rates on imported iron ore from these same ports to differential territory. *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 355 U.S. 175, 178 (1957).[9]

Finally, the court below did not even discuss the Commission's further conclusion that approval of the

[9] Elsewhere, (J.S. App. A, p. 25) the court below may have been holding or suggesting that the Commission's powers to deal with such rate relationships are less in an investigation and suspension proceeding under Section 15(7) of the Act than in a proceeding on a complaint alleging violation of Section 3(1). To the contrary, Section 15(7) specifically provides that in proceeding under that section "the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective."

proposed rates would require that the lines serving the southern tier ports be allowed to use their cost advantages to restore the differentials at a lower rate level—with a resulting dissipation of carrier revenues. The failure of the court below to even discuss this aspect of the Commission's decision was error.

The inadequacy of the decision below in dealing with the complex and important problems of this case may be specifically illustrated by two matters. Thus, in criticizing the Commission's consideration of relative distance to the ports, the court below stated that "Even while proclaiming this new rule, the Commission ignores it. Import rates from Portland may remain on a parity with Baltimore in spite of a distance advantage of more than 300 miles" (J.S. App. A, p. 35). In fact, as the Commission pointed out in its report (App., p. 101), Portland enjoys import rates on the Baltimore level to differential territory only via routes of Canadian railroads whose lines extend from Portland through Canada to that territory, and whose rates are not subject to regulation by the Commission.

Similarly, the court below stated that the Commission's ultimate conclusion of undue prejudice to the southern tier ports was completely contradicted by its statement in its report on reconsideration that "so far as Boston, Portland, and Albany are concerned, such [rate] equalization would not materially affect the flow of foreign traffic through any of those ports" (J.S., App. A, p. 36). The criticized statement is based upon the fact that Boston and Portland, which already have the same rates as New York, and Al-

bany, which has lower rates on the same basis as Philadelphia, cannot now compete effectively for general cargo traffic against New York with its non-rate advantages (e.g., more frequent sailings). For such traffic, Boston, Albany and Portland must compete with New York (which already has most of it)—rather than with the southern tier ports which have relatively little of it even under the existing rate differentials.

Generally, the decision below comes close to holding that differences in distance (and related costs) are totally irrelevant in determining the lawfulness of these competitive rates on import and export traffic, and that the controlling interest is the freedom of the railroads serving the respective ports to compete for such traffic in total disregard of effect upon the ports or upon the carriers' own revenues. We submit that such a result deletes "ports" from the protection of Section 3(1), and ignores the objective of the National Transportation Policy to encourage "sound economic conditions in transportation."

## CONCLUSION

This appeal raises substantial questions which are of great importance both to the ports and railroads involved and in the maintenance of sound transportation conditions. It is respectfully submitted that probably jurisdiction should be noted.

Respectfully submitted.

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MAY 1962